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DATO' SERI TIMOR SHAH RAFIQ v. NAUTILUS TUG & TOWAGE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA YUSSOF AHMAD J
[ORIGINATING SUMMONS NO: WA-24NCC-629-11-2023]
4 OCTOBER 2024

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Abstract – *The approval by a director of an increase in management fees, may be temporary and may not necessarily bind the director to approve future increases without justification. The director may request justification for the fees even if he had previously approved an increase. Further, a delay in challenging the said fees could not be said to be unreasonable if the director has made unrelenting efforts to obtain justification for the fees before turning to litigation as a final resort. When a director makes a request for the documents related to the justification for the management fees, such attempt is not necessarily an attempt to access privileged information, especially if the documents are mere routine commercial records.*

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COMPANY LAW: *Derivative action – Leave – Application by director ('applicant') on behalf of company – Dispute on quantum of monthly management fees paid by company to holding company – Whether test for leave to commence derivative action satisfied – Whether applicant acted in good faith – Whether application prima facie in best interest of company for leave to be granted – Whether applicant established honest belief that good causes of action existed with reasonable prospects of success – Whether applicant estopped from going back to agreement to increase management fees – Whether inordinate and unreasonable delay on part of applicant in pursuing action – Whether derivative action abuse of process – Whether would give rise to multiplicity of proceedings – Whether would cause company to adopt contradictory position to one taken in another suit – Companies Act 2016, ss. 347 & 348*

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The plaintiff, a director of the defendant, had filed this application *via* encl. 1 seeking leave to commence a derivative action on behalf of the defendant pursuant to ss. 347 and 348 of the Companies Act 2016 ('Act') ('encl. 1'). The crux of the dispute revolved around the quantum of the monthly management fees paid by the defendant to its holding company, Azimuth Marine Sdn Bhd ('AMSB'), that had skyrocketed from USD8,000 to USD40,000 and later to USD60,000 which according to the plaintiff were grossly excessive, unsubstantiated and unjustified. The majority directors resisted the plaintiff's application on the grounds that (i) the plaintiff was estopped from going back on his agreement to the increase in management fees which he allegedly approved without qualification at the defendant's Board of Directors ('Board') meeting on 2 November 2016; (ii) there had

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been an inordinate and unreasonable delay of six years on the part of the plaintiff in pursuing the present originating summons since he first challenged the increase in management fees on 14 November 2017. The plaintiff had ample opportunity to commence this action much earlier but chose not to do so and the delay had cast serious doubts on the plaintiff's *bona fides*; (iii) the plaintiff's intended derivative action was an abuse of process as he was seeking to access privileged information pertaining to the defendant's conduct in the plaintiff's lawsuits and/or effectively stifle the defendant from defending against his lawsuits. Such information was protected by legal professional privilege and the plaintiff was well aware of this since he had voluntarily excused himself from Board discussions on issues pertaining to his lawsuits; (iv) the plaintiff's intended derivative action was an abuse of process as it would give rise to multiplicity of proceedings since the issue of the legitimacy of the management fees paid by the defendant was already a live issue before the Court of Appeal in the defendant's pending appeal against the dismissal of Suit No. WA-22NCC-163-05-2017 ('Suit 163'); and (v) the plaintiff's intended derivative action would cause the defendant to adopt a position on the legitimacy of the management fees that was contradictory to the stand which it had taken in Suit 163. This would severely prejudice the defendant's appeal against the dismissal of Suit 163 as it would effectively be an admission by the defendant that it had previously advanced a case on the management fees that was palpably unsustainable. The plaintiff unequivocally refuted the majority directors' contentions and submitted that: (i) while acknowledging that he did vote in favour of increasing the management fees at the 2 November 2016 Board meeting, his consent was expressly subject to two vital conditions, namely: (a) the increased fee of USD40,000 per month was only to be budgeted for one year, from 1 October 2016 to 30 September 2017; and (b) the Board had unanimously resolved that the budget for the management fees for the financial years after 30 September 2017 must be reviewed afresh by the Board. Accordingly, the plaintiff was duty-bound as a director to insist that any increase in management fees beyond the 2016 to 2017 financial years must be properly substantiated before being approved; (ii) the contemporaneous documentary evidence incontrovertibly showed that the plaintiff brought this application only as a measure of last resort and after repeated attempts to procure justification and supporting documents from the majority directors had proven futile; (iii) over the years, the majority directors had never once claimed that the plaintiff's requests for the management fees to be substantiated amounted to a backdoor attempt to access privileged information. Parties could not be permitted to make submissions on factual matters that were never pleaded or deposed to contemporaneously; (iv) despite sharing the common thread of the legitimacy of the management fees paid to AMSB, the substance, character and effect of Suit 163 and the intended derivative action were fundamentally different; and (v) whilst accepting that the defendant had in Suit 163 took the position that the increase in management fees paid to AMSB was legitimate, the

plaintiff argued that this could not be a bar to the defendant now taking a correct stand in the intended derivative action that the increase was in fact wholly unsubstantiated. The plaintiff further highlighted that, in any event, the company's claim for management fees as general damages in Suit 163 had already been dismissed by the High Court and did not form the subject matter of the pending appeal.

Held (allowing encl. 1):

(1) The plaintiff's agreement to increase the management fees was clearly temporal in nature, limited to one year with the condition that it would be reviewed for subsequent years. Directors were not perpetually estopped from requesting the management fees be proven and substantiated, just because an increase was previously approved by the Board. This would lead to perverse outcomes whereby a company would be forever bound by an unsubstantiated increase in fees regardless of whether it is justified. The plaintiff had, at all material times, been steadfast in his stand that the quantum of the management fees paid to AMSB must be fully justified by reference to the actual work done. The majority directors' submission that the plaintiff had given an unqualified consent to the fee increase in perpetuity was thus wholly untenable and must be rejected. The plaintiff was not estopped, either in law or in fact, from seeking documentary proof to justify the increased management fees charged by AMSB to the defendant for the period post 30 September 2017. The plaintiff was entitled to exercise his statutory right under ss. 347 and 348 of the Act to bring a derivative action to safeguard the defendant's interests. (paras 51, 57, 59 & 60)

(2) A chronology of the plaintiff's unrelenting efforts to seek accountability from the majority directors showed 27 instances spanning a period of six years from 14 November 2017 to 19 September 2023, where the plaintiff had tirelessly sought a breakdown of the management fees as well as an account of the exact services rendered by AMSB to justify the astronomical increase from USD8,000 to USD40,000 and later to USD60,000 per month. These requests were met with either stony silence or vague responses bereft of any documentary evidence. Rather than being indolent, as alleged by the defendant, it appeared that the plaintiff exhibited considerable patience by allowing the majority directors an adequate opportunity to address his concerns before initiating this action. The plaintiff's forbearance in exhausting all informal avenues for redress before resorting to litigation must be viewed as a mark of his reasonableness and good faith, not a lack thereof. There had been no inordinate or unreasonable delay on the plaintiff's part in commencing the present action which would constitute an abuse of process. (paras 63, 64 & 72)

(3) The majority directors' position that the plaintiff's intended derivative action was an abuse of process serving as means to access privileged information, did not seem well-supported. This contention emerged relatively late and reflected an attempt to hinder the plaintiff's claim. It was in fact the majority directors' obdurate refusal to provide any supporting documents to show that AMSB had rendered services commensurate with the management fees paid that smacked of bad faith and improper purpose. The inference that emerged from the majority directors' conduct was that it had no credible evidence to justify the exponential increase in management fees and was hence seeking to hide behind the cloak of privilege to avoid scrutiny. The argument on legal professional privilege which was never once raised contemporaneously but advanced for the first time in these proceedings, was an afterthought that was factually and legally unsustainable. The plaintiff had amply demonstrated that the documents sought in the intended derivative action were all in the nature of routine commercial records that did not attract privilege. (paras 40 & 83)

(4) A close examination of the pleadings in Suit 163 and the intended derivative action showed that while both suits concerned the legitimacy of the management fees as a common factual substratum, they were materially different in substance, character and effect. In Suit 163, the defendant had sued the plaintiff, Nautilus Supreme Sdn Bhd and one Dato' Wan for alleged conspiracy to injure the defendant and breach of duties as directors. The defendant's pleaded case was that the defendants in that suit had, by their various acts, conspired to disrupt and destabilise the defendant's operations. The purported increase in management fees paid to AMSB was pleaded as part of the special damages flowing from the alleged conspiracy. The judge had dismissed the defendant's claim for conspiracy in its entirety, including the general damages. The finding on the lack of causation between the alleged conspiracy and the heads of general damages claimed were not appealed against. The live issue in the defendant's pending appeal, therefore, did not concern the legitimacy of the management fees *per se* but whether the alleged conspiracy and breach of duties by the defendants had been made out. In diametric contrast, the intended derivative action concerned a direct challenge by the plaintiff on behalf of the defendant against the majority directors and AMSB on the propriety of the management fees. The thrust of the plaintiff's case was that the majority directors had breached their fiduciary duties to the defendant by approving a colossal increase in the management fees, from USD8,000 to USD40,000 and subsequently to USD60,000 per month, without any proper justification or supporting evidence that AMSB had provided services commensurate with the fees paid. The majority directors failed to demonstrate any abuse of process or risk of multiplicity arising from the intended derivative action. (paras 88-90 & 108)

(5) The majority directors' argument on the defendant taking a contradictory position in the intended derivative action was a mere red herring that was both factually and legally unsustainable. There was no reasonable basis for concluding that the defendant would be prejudiced in defending the appeal in Suit 163 by taking the correct position in the intended derivative action that the increase in management fees paid to AMSB was indefensible. The claim for additional management fees had already been dismissed by the High Court in Suit 163 and did not arise in the pending appeal. In any event, there was clear evidence that the payments were wholly unjustified and the defendant could not be prevented from abandoning its previous erroneous stance and adopting the right position. The majority directors who were responsible for committing the defendant to an untenable position in Suit 163 could not be heard of complaining of prejudice. (paras 100 & 107)

(6) The plaintiff had met the threshold requirements under s. 348(4) of the Act for leave to commence a derivative action. The plaintiff had demonstrated that he was acting in good faith and that it appeared *prima facie* to be in the best interest of the company for the intended derivative proceedings to be pursued. The majority directors' objections on the grounds of estoppel, delay, abuse of process, multiplicity of proceedings, and contradictory positions have been found to be without merit. The plaintiff had established a strong *prima facie* case of breaches of directors' duties and unjust enrichment that warranted further investigation through a full trial. (para 118)

Case(s) referred to:

Ang Thiam Swee v. Low Hian Chor [2013] 2 SLR 340 ***(refd)***

Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 7 CLJ 808 CA ***(refd)***

Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd [2022] 8 CLJ 529 CA ***(refd)***

Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd & Another Appeal [2024] 4 CLJ 499 FC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Fazal Ellahi Oli Mohamed & Anor v. K M Oli Mohamed Sdn Bhd [2023] 8 CLJ 687 CA ***(dist)***

Foss v. Harbottle [1843] 67 ER 189 ***(refd)***

Golden Plus Holdings Bhd & Ors v. China Idea Development Limited & Ors [2021] CLJU 2083; [2021] 1 LNS 2083 HC ***(refd)***

Ho Num Chon & Anor v. Tech-Lab Manufacturing Sdn Bhd [2017] 5 CLJ 187 HC ***(dist)***

Independent Oil Tools Ltd v. Dato' Ramli Md Nor & Ors [2018] 5 CLJ 706 HC ***(refd)***

Lai Kim Loi v. Datuk Lai Fook Kim & Co [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 SC ***(dist)***

LeDrew v. LeDrew Lumber Co [1988] NJ No. 325 ***(dist)***

Lie Kok Keong v. Tang Container & Services Sdn Bhd [2003] 4 CLJ 288 CA ***(refd)***

Loh Teck Wah v. Lim Pang Kiam & Ors [2022] CLJU 2266; [2022] 1 LNS 2266 HC ***(dist)***

Malayan Banking Bhd v. Boo Hock Soon [2012] CLJU 971; [2012] 1 LNS 971 CA ***(refd)***

Ng Pak Mui v. Tay Mary & Ors [2022] CLJU 780; [2022] 1 LNS 780 HC ***(dist)***

Ong Keng Huat v. Fortune Frontier (M) Sdn Bhd & Anor [2015] 10 CLJ 599 HC ***(refd)***
Pang Yong Hock & Anor v. PKS Contracts Services Pte Ltd [2004] 3 SLR(R) 1 CA ***(refd)***
Por Lin Chiang v. Tanjung Aircond Engineering Sdn Bhd & Anor [2019] 1 CLJU 700; [2019] 1 LNS 700 HC ***(refd)***
Sematan Shrimp Hatchery Company v. Aqua Fresh Company [2005] 7 CLJ 505 HC ***(refd)***
Swansson v. RA Pratt Properties Pty Ltd & Anor [2002] NSWSC 583 ***(refd)***
Tai May Chean v. United Eastern Resources Sdn Bhd & Anor [2022] 2 CLJ 757 CA ***(refd)***

Legislation referred to:
Companies Act 2016, ss. 347, 348(4), 350(b)

For the plaintiff - Lim Chee Wee, Jasper Tan, Wee Hee, Emily Ho & Kuljeet Kaur; M/s Jasper Hee Partnership
For the defendant - Daniel Albert, Ashok K Raman, Shermaljit Singh & Natalie Lim; M/s A K Raman Nair

Reported by Lina E

JUDGMENT

Atan Mustaffa Yussof Ahmad J:

[1] This case, like many before it, turns on a question of money. We are concerned with a company, born of partnership but now riven by discord. At its helm, a board of directors split asunder – the majority on one side, a lone minority director on the other. The bone of contention? Management fees, substantial in sum, paid to a related company. The minority director cries foul, alleging these fees to be excessive, unjustified, and a breach of fiduciary duty. The majority stands firm, insisting all is above board, approved and proper. And so we find ourselves in this court, asked to grant leave for a derivative action. Is there substance to these claims? Does good faith guide the applicant's hand? Or is this, as the respondents contend, merely much ado about nothing? These are the questions we must answer, for on them hangs the fate of the company and, perhaps, the very principles of corporate governance itself.

Background Facts

[2] Nautilus Tug & Towage Sdn Bhd ("the company") is a joint venture between Azimuth Marine Sdn Bhd ("AMSB") and Nautical Supreme Sdn Bhd ("NSSB"), established pursuant to a shareholders agreement dated 15 March 2013. AMSB holds 80% of the shares in the company, while NSSB holds 20%.

[3] The company's board of directors ("the board") comprises nominees from both AMSB and NSSB. The AMSB nominees include Dato' Sri Captain Suresh Emmanuel Abishegam ("Captain Suresh"), Ahmad Lutfi Bin Abd Latiff ("Ahmad Lutfi"), Dato' Sri Abd Rahim Bin Jaafar ("Abd Rahim"), and Mak Lin Kum ("Mak"). The NSSB nominees are the plaintiff,

A Dato' Seri Timor Shah Rafiq and Dato' Wan Mohamed Yaacob bin Dato' Wan Salaidin ("Dato' Wan"). Jaya Sudhir a/l Jayaram ("Jaya Sudhir') is also a director of the company.

[4] On 11 April 2013, the company entered into a harbour tugs services agreement with Vale Malaysia Minerals Sdn Bhd for the charter of seven B harbour tugboats for a period of 15 years. This agreement was expected to generate potential revenue for the company in excess of USD200 million over the 15-year period.

[5] On 12 April 2013, the company entered into a BIMCO standard ship management agreement with Azimuth Ship Management Sdn Bhd ("ASM") C to manage, operate, and control the tugboats for 15 years. Captain Suresh holds 95% of the issued and paid-up shares in ASM.

[6] At a board meeting on 22 August 2013, AMSB was appointed to manage the administrative, corporate, finance, tax, and other matters of the D company. The board resolved that a monthly management fee ("management fees") of USD8,000 would be paid to AMSB to cover its costs and the company's office costs.

[7] At a board meeting on 2 November 2016, a proposal was tabled to increase the management fees from USD8,000 to USD40,000. This was said E to be due to increased workload on AMSB resulting from legal actions commenced by the plaintiff and NSSB against the company. The board, including the plaintiff, approved this increase on the condition that it was only budgeted for one year (from 1 October 2016 to 30 September 2017) and would only be applicable while the legal matters were ongoing.

F **[8]** At a board meeting on 14 November 2017, when the company's updated financial budget was tabled, the plaintiff objected to the continued payment of the USD40,000 management fees beyond 30 September 2017. Despite this objection, the majority of directors approved the continuation of this fee.

G **[9]** At a board meeting on 10 April 2018, Captain Suresh proposed a further increase in the management fees from USD40,000 to USD60,000, citing the need to engage experts and consultants for ongoing legal matters. Despite the plaintiff's objection, the majority of directors approved this increase.

H **[10]** From 31 September 2017 to March 2023, the company paid a total of USD2,112,000 to AMSB as management fees (in excess of the initial USD8,000 per month).

[11] The plaintiff made numerous requests, both verbally at board meetings I and in writing, for justification and supporting documents for the increased management fees. These requests were made on at least 27 occasions between 2016 and 2023.

[12] On 19 September 2023, the plaintiff gave notice to the board of his intention to apply for leave of court to initiate derivative proceedings under s. 348 of the Companies Act 2016 on behalf of the company against the majority directors, management, and any other parties responsible for the alleged loss and damage suffered by the company.

[13] On 19 October 2023, the company's solicitors responded to the plaintiff's notice, stating that the issues raised had been addressed and resolved by the board on multiple occasions.

[14] On 10 November 2023, the plaintiff filed this originating summons, seeking leave under ss. 347 and 348 of the Companies Act 2016 to commence derivative proceedings on behalf of the company against several parties, including Captain Suresh, other AMSB nominee directors, and AMSB itself.

[15] The company, through its director Mak, filed affidavits opposing the plaintiff's application on 29 December 2023 and 14 February 2024. The plaintiff filed affidavits in reply on 26 January 2024 and 7 March 2024.

[16] In addition to this dispute, there are several other ongoing legal proceedings involving the company, the plaintiff, NSSB, and other related parties, including appeals and arbitration proceedings.

The Plaintiff's Originating Summons

[17] In this originating summons, the plaintiff seeks leave under ss. 347, 348, and 350 of the Companies Act 2016 to commence derivative proceedings on behalf of the company against nine specific parties: Captain Suresh, Dato' Ahmad Johari Bin Abdul Razak ("Johari"), Ajaib Hari Dass, Dato' Abd Latiff bin Ahmad ("Latiff"), Jaya Sudhir, Mak, Ahmad Lutfi, Abd Rahim and AMSB.

[18] The plaintiff requests authorisation to control these proceedings and seeks directions for their conduct. A key element of the application is the request to reduce the management fees paid by the company to AMSB to USD8,000 per month, reverting to the original amount, pending the final resolution of the derivative proceedings. Furthermore, the plaintiff asks the court to order the company to pay all reasonable legal fees and disbursements incurred by the plaintiff in connection with this application on a full indemnity basis. This includes costs related to the current application for leave and any interim relief, as well as the costs to be incurred in the proposed derivative proceedings against the named parties. The plaintiff also seeks any further or other relief that the court considers just or reasonable under the circumstances of the case.

[19] The plaintiff's grounds for this application are primarily based on the alleged unjustified increases in management fees paid by the company to AMSB. The plaintiff contends that these fees were increased from USD8,000

to USD40,000, and later to USD60,000 per month, without proper justification or supporting documentation. Despite repeated requests at board meetings and through correspondence, the plaintiff claims that the majority directors and management refused to provide satisfactory explanations or substantiating documents for these increases. The plaintiff argues that these actions, particularly the continued payment of high fees during the movement control order period when activities were restricted, were not in the company's best interests. After unsuccessful attempts to resolve the matter through the board, including a statutory notice of intent to apply for leave to initiate derivative proceedings, the plaintiff asserts that this application is necessary to seek redress for the company and recover the allegedly unjustified payments.

[20] This originating summons is opposed by Jaya Sudhir and AMSB's nominee directors who are collectively referred to as "majority directors".

Parties' Submissions

*The Plaintiff's Submission*s

[21] The core issue, as submitted by the plaintiff, is that the increase in management fees from USD8,000 to USD40,000/60,000 per month paid by the company to AMSB is wholly unsubstantiated and unjustified. Despite repeated requests over six years, the majority directors have failed to provide any documentation or justification for this significant increase, which has resulted in over USD2.1 million in excess fees paid to AMSB since 2017.

[22] The plaintiff contends he is acting in good faith and it is in the best interests of the company to grant leave for the derivative action. The plaintiff argues there are good grounds to believe the majority directors breached their duties by approving the unjustified fee increase, and that AMSB was unjustly enriched. The plaintiff refutes allegations of delay, stating he only filed this action as a last resort after years of unsuccessfully seeking justification through board meetings and correspondence.

[23] The plaintiff rejects the company's arguments that this action is an abuse of process or gives rise to multiplicity of proceedings. He contends the documents requested are routine business records, not privileged information. The plaintiff argues the issues are distinct from an ongoing Suit WA-22NCC-163-05/2017 ("Suit 163"), where the company claimed the management fees as part of general damages which was dismissed by the High Court and is currently pending appeal, and will not result in contradictory positions. Overall, the plaintiff submits the derivative action has merit and should be allowed to proceed to recover the excess fees for the benefit of the company.

The Majority Directors' Submissions

[24] In summary, the company submits that the increased management fees were a lump sum agreement unanimously approved by the board, including the plaintiff, at the November 2016 meeting. It was agreed to be applicable while the plaintiff's lawsuits against the company were ongoing, which they still are. The plaintiff is now attempting to renege on his own agreement and is estopped from doing so.

[25] The majority directors argue there was no contractual obligation for AMSB to provide justification or supporting documents for the work done, as it was a lump sum agreement. The plaintiff's complaints about lack of substantiation are therefore baseless. The majority directors contend that the plaintiff has not demonstrated any good cause of action with reasonable prospects of success against either of the majority directors for breach of duties or AMSB for unjust enrichment.

[26] The majority directors submit that the application is an abuse of process, as the plaintiff is seeking to access privileged information pertaining to the company's conduct in the very lawsuits he has initiated against it. Furthermore, the company argues that granting leave would give rise to a multiplicity of proceedings, as the legitimacy of the management fees is already a live issue in the ongoing Suit 163 appeal.

[27] Lastly, the majority directors contend that the court should not interfere with what was essentially a commercial decision made by the board. The majority directors assert that the plaintiff has not met the high threshold required for leave to commence a derivative action, and therefore the originating summons should be dismissed with costs.

The Law On Derivative Actions

[28] Derivative actions in Malaysia are governed by ss. 345 and 347 to 350 of the Companies Act 2016. These provisions establish a statutory framework for bringing derivative actions on behalf of a company, replacing the common law position previously governed by the rule in *Foss v. Harbottle* [1843] 67 ER 189. As noted by the High Court in *Independent Oil Tools Ltd v. Dato' Ramli Md Nor & Ors* [2018] 5 CLJ 706, this statutory regime has abrogated the right to bring derivative actions at common law.

[29] Section 347 of the Companies Act 2016 provides that a complainant may, with leave of the court, initiate, intervene in, or defend proceedings on behalf of the company. Section 348(4) sets out the criteria for granting leave:

> In deciding whether or not the leave shall be granted, the Court shall take into account whether:
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> (a) the complainant is acting in good faith; and
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> (b) it appears *prima facie* to be in the best interest of the company that the application for leave be granted.

[30] The Federal Court in *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd & Another Appeal* [2024] 4 CLJ 499 clarified that these two elements – good faith and best interests of the company – must be independently assessed. The court stated:

> It is however significant to note that unlike some other jurisdictions, the element of 'good faith' is a requirement or a pre-requisite under s. 348(4) of the Companies Act 2016 and not merely a factor to be taken into account by the courts. It must be treated separately from the other pre-requisite of 'best interest' although factually the two pre-requisites may sometimes overlap.

[31] Regarding the burden of proof, the Federal Court affirmed the position taken in *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808, holding that the onus of proof is on the applicant on a balance of probabilities for the good faith element. For the best interests of the company, the assessment is on a *prima facie* basis.

[32] The test for good faith, as elaborated by the Supreme Court of New South Wales in *Swansson v. RA Pratt Properties Pty Ltd & Anor* [2002] NSWSC 583 and adopted by the Federal Court in *Dato' Seri Timor Shah Rafiq*, comprises both subjective and objective components. The Federal Court stated:

> It may therefore be surmised that the test for assessing honest belief comprises of both subjective and objective components, namely whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success (subjective component), and the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief (objective component).

[33] The application must not be brought for a collateral purpose amounting to an abuse of process. However, as noted by the Singapore Court of Appeal in *Ang Thiam Swee v. Low Hian Chor* [2013] 2 SLR 340 and affirmed by the Federal Court, the mere presence of ongoing disputes or litigation between parties does not automatically indicate a collateral purpose. The Federal Court stated:

> Even in a case where there is a personal animus against the company, or other members of it, that cannot be significant, let alone decisive ... It is perhaps only in exceptional cases where the applicant is so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations such that the court may find lack of good faith on his part.

[34] Regarding the best interests of the company, the Federal Court in *Dato' Seri Timor Shah Rafiq* endorsed the approach taken by the High Court in *Ong Keng Huat v. Fortune Frontier (M) Sdn Bhd & Anor* [2015] 10 CLJ 599, stating:

> The general approach of the courts is not to go into the merits of the case and conduct a mini trial but to consider whether the proposed action is legitimate and arguable.

[35] Commercial considerations are relevant in assessing the best interests of the company. The Federal Court cited with approval the observation of the Singapore Court of Appeal in *Pang Yong Hock & Anor v. PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1:

> The company may have genuine commercial considerations for not wanting to pursue certain claims. Perhaps it does not want to damage a good, long-term, profitable relationship. It could also be that it does not wish to generate bad publicity for itself because of some important negotiations which are underway.

Analysis And Findings Of The Court

Test For Leave To Commence A Derivative Action Satisfied

[36] The crux of the dispute revolves around the quantum of monthly management fees paid by the company to its holding company, AMSB. The plaintiff asserts that the management fees, which had skyrocketed from USD8,000 to USD40,000 and later to USD60,000 per month, are grossly excessive, unsubstantiated, and unjustified.

[37] The court finds that the plaintiff has satisfied the test for leave to commence a derivative action under s. 348(4) of the Companies Act 2016. The plaintiff has demonstrated that he is acting in good faith and that it appears *prima facie* to be in the best interest of the company for leave to be granted.

[38] The plaintiff has established an honest belief on his part that good causes of action exist against the proposed defendants with reasonable prospects of success. The contemporaneous evidence shows that despite the plaintiff's repeated requests over a prolonged period from 2016 to 2023, on no less than 27 occasions, the majority directors have refused to provide any satisfactory justification or supporting documents to substantiate the substantial escalation in the monthly management fees paid by the company to AMSB from the initial USD8,000 to USD40,000 and then USD60,000. The only explanation proffered by the majority directors was the vague assertion that AMSB required more resources to handle legal actions commenced by the plaintiff. However, this is contradicted by the evidence that the company's affairs are managed by its own personnel, external solicitors, consultants and auditors who are separately remunerated by the company. Further, the management fees paid to AMSB for supposed litigation support from 1 October 2017 to 31 March 2023 (approximately USD2,640,000) unjustifiably exceeds the actual legal fees paid to the company's solicitors (approximately USD1,975,765).

[39] There are therefore overwhelming grounds for the plaintiff to honestly believe that the company has good causes of action against the majority directors for breaches of their statutory and fiduciary duties in causing the company to make unsubstantiated payments to AMSB, and against AMSB for unjust enrichment at the company's expense. The objective component of the 'honest belief' requirement is also satisfied as the court finds that a reasonable person in the plaintiff's position could hold such beliefs, applying the test propounded by the Federal Court in *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* (*supra*).

[40] The court rejects the contention of the majority directors that the plaintiff has no cause of action against AMSB for unjust enrichment. The contemporaneous evidence shows AMSB received the increased management fees without providing proof of the actual costs incurred or work done to warrant such substantial payments. There is therefore a *prima facie* case that AMSB was unjustly enriched and has no viable defence to justify its enrichment at the company's expense, following *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441 (Federal Court). The majority directors' argument that there was a lump sum agreement with AMSB is a matter for trial and does not negate the *prima facie* case of unjust enrichment.

[41] On the element of collateral purpose, the court finds that the plaintiff is not pursuing the intended derivative action for any ulterior motive unrelated to the company's interests. The majority directors' allegations of collateral purpose are mere conjecture unsupported by evidence. Instead, the objective evidence demonstrates the plaintiff brought this application as a last resort after exhausting all avenues to seek redress on the company's behalf. The mere existence of other disputes between the parties does not equate to the plaintiff acting in bad faith or for a collateral purpose, following *Tai May Chean v. United Eastern Resources Sdn Bhd & Anor* [2022] 2 CLJ 757; [2022] 4 MLJ 779 (Court of Appeal) and other authorities. In fact, judgments in the other litigation vindicate the plaintiff's *bona fides* and concerns over corporate governance in the company.

[42] It plainly appears *prima facie* to be in the company's best interest for the intended derivative action to be pursued. It is undisputed that as at March 2023, the company paid AMSB USD3,453,066.67 in management fees, of which USD2,112,000 was unsubstantiated. This caused the company to suffer substantial losses, with the management fees exceeding 100% of the company's net profit from 2020 onwards. In light of the majority directors' persistent failure to justify the payments, the intended action has good prospects of enabling the company to recover its losses from the proposed defendants. This would also serve to prevent further diversions of the company's funds.

[43] In conclusion, the plaintiff has amply fulfilled the requirements under s. 348(4) of the Companies Act 2016 for leave to commence a derivative action.

[44] I shall now address the majority directors' particular grounds in resisting the plaintiff's application.

The Plaintiff's Agreement To The Increase In Management Fees

[45] The majority directors resist the plaintiff's application, arguing that the plaintiff is estopped from going back on his agreement to the increase in management fees which he allegedly approved without qualification at the company's board of directors meeting on 2 November 2016. The majority directors contend that the plaintiff, having consented to the increase in management fees from USD8,000 to USD40,000 per month at the material time, with the only stipulations being that the increase be budgeted for one year and would only apply as long as the legal matters were ongoing, cannot now resile from his prior approval on the basis of purported variances in AMSB's workload.

[46] The plaintiff unequivocally refutes the majority directors' contentions. While acknowledging that he did vote in favour of increasing the management fees at the 2 November 2016 board meeting, the plaintiff maintains that his consent was expressly subject to two vital conditions. First, the increased fee of USD40,000 per month was only to be budgeted for one year from 1 October 2016 to 30 September 2017. Second, the board had unanimously resolved that the budget for the management fees for the financial years after 30 September 2017 must be reviewed afresh by the board. Accordingly, the plaintiff asserts that he is duty-bound as a director to insist that any increase in management fees beyond the 2016 to 2017 financial year must be properly substantiated before being approved.

[47] The central issue that falls for determination is whether the plaintiff, having agreed to the conditional increase in management fees at the 2 November 2016 board meeting, is estopped from questioning the quantum of the fees and demanding documentary proof to justify the same for the period post – 30 September 2017.

[48] To determine this issue, it is imperative to carefully examine the exact terms of the board's resolution on 2 November 2016 as reflected in the minutes of the meeting. The pertinent extract states:

> The board AGREED for the increase in the management fee of USD40,000 per month as proposed however it should be budgeted only for 1 year accordingly and not for all the remaining years as it will only be applicable whilst the legal matters were ongoing.
>
> The board then unanimously RESOLVED AND APPROVED the following:

> The revised budget for financial year from 1st October 2016 to 30th September 2017 and the budget for subsequent years are to be reviewed again in the next financial year;

[49] The board resolution, couched in clear and unambiguous language, stipulates that the board's approval for the increased management fees of USD40,000 per month was circumscribed by two important conditions. The first is a time limit restricting the approval to a single financial year from 1 October 2016 to 30 September 2017. The second is the requirement for the quantum of management fees for the subsequent financial years to be subjected to a compulsory review by the board. Read conjunctively, these two conditions lead to the inexorable conclusion that the plaintiff's consent to the fee increase was a qualified one and cannot under any circumstances be interpreted as an open-ended approval.

[50] It is noteworthy that the plaintiff had specifically insisted on the incorporation of the two conditions to ensure that the board maintains control over the payment of management fees to AMSB. This was to enable the board to assess the reasonableness of the fees paid from year to year and to ascertain whether the quantum was commensurate with the actual work done by AMSB in managing the company's affairs. In insisting on these safeguards, the plaintiff was simply carrying out his statutory and fiduciary duties as a director to safeguard the company's assets and financial interests.

[51] In my judgment, the plaintiff's agreement to increase the management fees was clearly temporal in nature, limited to one year with the condition that it will be reviewed for subsequent years. I respectfully disagree with the majority directors' position that directors are perpetually estopped from requesting the management fees to be proven and substantiated just because an increase was previously approved by the board. This would lead to perverse outcomes whereby a company would be forever bound by an unsubstantiated increase in fees regardless of whether it is justified.

[52] Such an argument was in fact rejected by the Court of Appeal in the *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* [2022] 8 CLJ 529 where Dato' Seri Timor Shah, who is the plaintiff here, challenged the majority shareholders for failing to provide proper documentation and explanations regarding USD19.9 million in shareholders' advances purportedly made for the purchase of tug boats, which led to concerns over the transparency and accuracy of the company's financial records ('shareholders' advance suit'). There, the majority directors raised similar allegations of estoppel, arguing that since Dato' Seri Timor Shah had previously approved the shareholders' interests, he is estopped from questioning the legitimacy thereof. Justice Lee Swee Seng in allowing Dato' Seri Timor Shah's appeal held at para. 119:

> At any rate, we fail to understand how by the Minority Shareholder having accepted some payments of Shareholders' Interest, they are then barred forever from disputing the correctness of the Shareholders'

> Advances captured in the audited accounts. Timor accepts the fact that if the wrong amount of Shareholders' Advances would impinge on their portion of the Advance, then they would also have to refund the Interest paid and had given an undertaking to that effect. Accepting the argument that the Minority Shareholder cannot raise this issue of a restatement of the audited accounts would mean that the Minority Shareholder must continue to approve and accept the Shareholders' Interest in spite of their belief that the Advances had been wrongly captured in the audited accounts. That would leave no room for repentance after realising one's sins of omission in not raising the objection earlier. That cannot be right in a case where a wrong is discovered later and the focus now has to be how to correct the wrong instead of being complicit in perpetuating a wrong.

[53] It would be a perverse outcome if the plaintiff is now barred from questioning the basis for the continued payment of inflated management fees to AMSB in the years after 2016 to 2017 simply because he agreed to a time-limited increase at the 2 November 2016 meeting. Such an approach would negate the express conditions imposed by the board resolution and expose the company to the risk of being overcharged by AMSB in the future without any oversight. This could not have been the intention of the board when passing the 2 November 2016 resolution, as it would be tantamount to the directors relinquishing their duties to the company.

[54] Citing authorities such as *Fazal Ellahi Oli Mohamed & Anor v. K M Oli Mohamed Sdn Bhd* [2023] 8 CLJ 687; [2023] 4 MLJ 302 and *Loh Teck Wah v. Lim Pang Kiam & Ors* [2022] CLJU 2266; [2022] 1 LNS 2266; [2022] MLJU 2385, the majority directors argue that the plaintiff is estopped from challenging the increase as he had previously consented to it. The majority directors' reliance on these is misplaced and distinguishable from the present factual matrix. In *Fazal Ellahi Oli Mohamed*, the complainant was found to be estopped from challenging the legality of a franchise agreement which he had knowingly executed. In *Loh Teck Wah*, the complainant was not allowed to impugn payments made by the company to its supplier which he had previously approved. However, in both those cases, there was clear evidence that the agreements in question were supported by the complainant's informed and unequivocal consent.

[55] In stark contrast, the plaintiff's consent to the increase in management fees in the present case was expressly contingent on the ongoing legal proceedings and the increase being substantiated with evidence. This is borne out by the plaintiff's contemporaneous objections and repeated requests for proof of the work allegedly done by AMSB to justify the fee increase. The absence of any detailed justification from the majority directors, despite the plaintiff's prodding, further strengthens the plaintiff's assertion that his agreement to the increase was not an unqualified one.

[56] The plaintiff's stance that the increase in management fees must be justified is further fortified by his comments on the draft minutes of the 2 November 2016 board meeting and averments in his supporting affidavits. In these documents, the plaintiff consistently questioned the rationale for the drastic increase in fees, describing it as a "preposterous justification." The plaintiff also repeatedly stated that the majority directors failed to provide any details to explain the increase and that his consent was conditional upon the subsistence of the legal proceedings. The plaintiff's unwavering position is eminently clear from his amendments to the draft minutes of the November 2016 meeting, where he sought to underscore that the fee increase was only approved for one year, subject to review.

[57] Viewed in totality, the contemporaneous documentary evidence overwhelmingly supports the plaintiff's contention that he has at all material times been steadfast in his stand that the quantum of management fees paid to AMSB must be fully justified by reference to the actual work done. The majority directors' submission that the plaintiff had given an unqualified consent to the fee increase in perpetuity is thus wholly untenable and must be rejected.

[58] In any event, even if there is any ambiguity in the construction of the board resolution, the benefit of the doubt must be accorded to the plaintiff who is merely seeking to uphold principles of good corporate governance. The plaintiff's insistence that AMSB must substantiate the increased management fees with credible evidence before the same can be approved for the years after 30 September 2017 is entirely consistent with his fiduciary obligations as a director to act in the best interest of the company. There is nothing invidious in the plaintiff's actions, as he is simply demanding proof that the management fees paid out of the company's coffers are commensurate with the actual work done by AMSB. To deny him the right to do so would be to subordinate the company's interests to those of AMSB, in flagrant disregard of the directors' duties.

[59] On a thorough evaluation of the evidence in its entirety, I find that the plaintiff is not estopped, either in law or in fact, from seeking documentary proof to justify the increased management fees charged by AMSB to the company for the period post 30 September 2017. The majority directors' argument that the plaintiff's consent to the increase at the 2 November 2016 board meeting precludes him from questioning the legitimacy of the fees subsequently is fatally flawed and must be rejected.

[60] For the reasons articulated above, I am satisfied that the plaintiff is entitled to exercise his statutory right under ss. 347 and 348 of the Companies Act 2016 to bring a derivative action to safeguard the company's interests. The majority directors have failed to demonstrate any estoppel operating against the plaintiff which prohibits him from questioning the

quantum of management fees paid to AMSB after 30 September 2017. I find the majority directors' contrary argument on this point to be unpersuasive and is hereby dismissed.

Delay In Pursuing The Current Originating Summons

[61] The majority directors contend that there has been an inordinate and unreasonable delay of six years on the part of the plaintiff in pursuing the present originating summons since he first challenged the increase in management fees on 14 November 2017. The majority directors argue that the plaintiff had ample opportunity to commence this action much earlier but chose not to do so. Reliance is placed on the decisions in *Fazal Ellahi Oli Mohamed v. KM Oli Mohamed Sdn Bhd* (*supra*) and *LeDrew v. LeDrew Lumber Co* [1988] NJ No. 325 to submit that the delay casts serious doubts on the plaintiff's *bona fides* in instituting this action.

[62] The plaintiff vehemently denies the majority directors' allegations. The contemporaneous documentary evidence incontrovertibly shows that the plaintiff brought this application only as a measure of last resort and after repeated attempts to procure justification and supporting documents from the majority directors had proven futile. The plaintiff highlights that since he first raised his grievance regarding the increase in management fees on 14 November 2017, he had on no less than 27 occasions, both verbally and in writing, implored the majority directors to furnish documentary proof to substantiate the exorbitant quantum of management fees. The plaintiff had also sought explanations for glaring anomalies in the payment of management fees, particularly during the periods of Movement Control Order where all non-essential activities were restricted, and when litigation involving the company was either concluded or held in abeyance.

[63] A chronology of the plaintiff's unrelenting efforts to seek accountability from the majority directors is set out in great detail at para. 78 of the plaintiff's reply submissions. It chronicles the 27 instances, spanning a period of six years from 14 November 2017 to 19 September 2023, where the plaintiff had tirelessly sought a breakdown of the management fees as well as an account of the exact services rendered by AMSB to justify the astronomical increase from USD8,000 to USD40,000 and later to USD60,000 per month. These requests were met with either stony silence or vague responses bereft of any documentary evidence. Despite being given every opportunity to vindicate the legitimacy of the payments, the majority directors had persistently failed to produce any credible proof that the quantum of management fees paid to AMSB was commensurate with the actual work done.

[64] Rather than being indolent as alleged, it appears the plaintiff exhibited considerable patience by allowing the majority directors an adequate opportunity to address his concerns before initiating this action. The plaintiff's forbearance in exhausting all informal avenues for redress before

resorting to litigation must be viewed as a mark of his reasonableness and good faith, not a lack thereof. As recognised by the Court of Appeal in *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* (*supra*) at para. 171:

> If there is any delay in filing this application for leave, it is that long suffering is a virtue in the circumstances of this case where every opportunity should be given to the majority directors to explain the queries and that a derivative action would be the last straw where all prior overtures had been rebuffed such a delay cannot be equated with a collateral purpose.

[65] The plaintiff's decision to accord the majority directors adequate time to respond to his queries before commencing this action is therefore wholly consonant with the requirements of good faith. To hold otherwise would be to penalise the plaintiff for attempting to resolve the matter internally and incentivise knee-jerk litigation at the first sign of impropriety. This would be anathema to the principles underlying the statutory derivative action.

[66] The majority directors' attempt to impugn the plaintiff's motives by citing the cases of *Fazal Ellahi* and *LeDrew* is, with respect, misplaced and must be rejected. Those cases involved a delay of ten years which was either unexplained or occasioned by a complete inaction on the complainant's part. This stands in sharp contrast to the present case where the six-year period between the plaintiff's first complaint and the filing of the originating summons is attributable to the plaintiff's considerable efforts in seeking an amicable resolution. There was not a single moment of inaction, as demonstrated by the extensive chronology of the plaintiff's verbal and written requests for information. The delay, if it can even be characterised as such, was not due to any indolence or collateral purpose on the plaintiff's part. Rather, it resulted from the majority directors unfortunately failing to provide a substantive response to the plaintiff's reasonable inquiries.

[67] The Court of Appeal in *Fazal Ellahi* made it abundantly clear that even an inordinate delay will not negate good faith if the same is properly accounted for. In the instant action, the plaintiff had furnished a comprehensive account in his affidavits of the steps taken to procure documentary evidence from the majority directors before seeking recourse to the courts. There is therefore no want of explanation for the time taken to commence the present proceedings. This is a key distinguishing factor from the cases relied upon by the majority directors.

[68] It is also noteworthy that the plaintiff had, in the six years prior to the filing of this action, actively raised the issue of the management fees at various board meetings. In particular, the plaintiff had tabled a motion to reduce the quantum of the management fees to its original sum of USD8,000 per month at the board meetings of 22 February 2021, 18 March 2022 and 23 September 2022. The plaintiff's conduct in pursuing this matter internally and providing the majority directors every chance to justify the payments

before taking out this originating summons is compelling evidence of his *bona fides* and militates strongly against any suggestion of delay or collateral purpose.

[69] On a holistic consideration of the evidence, I find that the plaintiff, had at all times, acted with alacrity and probity in seeking to bring the majority directors to account. The meticulously documented chronology of the plaintiff's endeavours to obtain answers from the majority directors both at formal board meetings and through informal correspondence leaves no room for doubt as to the plaintiff's good faith in commencing this action. The six-year period between the plaintiff's first complaint and the institution of this originating summons was a consequence of the majority directors' obduracy, not the plaintiff's indolence.

[70] The plaintiff had, with an abundance of caution and care, provided the majority directors every opportunity to vindicate the legitimacy of the substantial increase in management fees before taking the significant step of instituting a derivative action. This approach was rightly endorsed by the Court of Appeal in the shareholders' advance suit as being consonant with the duty of good faith. The delay, if any, was not inordinate or unreasonable but a necessary result of the plaintiff's painstaking efforts to procure accountability from the majority directors.

[71] The entire factual substratum of the present case is therefore a far cry from that in *Fazal Ellahi* and *LeDrew* where the element of delay was either inexplicable or the product of a protracted period of inaction. Those authorities, which turn on their peculiar facts, are hence readily distinguishable and do not advance the majority directors' case.

[72] For the foregoing reasons, I find that there has been no inordinate or unreasonable delay on the plaintiff's part in commencing the present action which would constitute an abuse of process. The majority directors' submission on this score is unpersuasive and is hereby dismissed.

Abuse Of Process: Plaintiff Seeking To Access Privileged Information

[73] The majority directors contend that the plaintiff's intended derivative action is an abuse of process as he is purportedly seeking to access privileged information pertaining to the company's conduct in the plaintiff's lawsuits and/or effectively stifle the company from defending against his lawsuits. The majority directors argue that the information ultimately sought by the plaintiff *vide* the intended derivative action includes matters relating to the company's conduct in the plaintiff's lawsuits, such as the details of staff, consultants or advisors engaged by AMSB as well as the exact work done by them. It is submitted that such information is protected by legal professional privilege, and the plaintiff is well aware of this since he had voluntarily excused himself from board discussions on issues pertaining to his lawsuits.

[74] The plaintiff vehemently denies the majority directors' allegations and contends that this argument is nothing more than a red herring designed to distract from the real issues at hand. The plaintiff highlights that over the years, the majority directors have never once claimed, whether in board meetings, correspondence or affidavits filed, that his requests for the management fees to be substantiated amounted to a backdoor attempt to access privileged information. This contention is only now raised for the first time in the majority directors' submissions and is plainly an untenable attempt to conjure up a new defence. It is a well-established principle of law that parties cannot be permitted to make submissions on factual matters that were never pleaded or deposed to contemporaneously, as such submissions are tantamount to evidence from the Bar. Support for this can be found in a long line of authorities including *Lie Kok Keong v. Tang Container & Services Sdn Bhd* [2003] 4 CLJ 288; *Sematan Shrimp Hatchery Company v. Aqua Fresh Company* [2005] 7 CLJ 505 and *Malayan Banking Bhd v. Boo Hock Soon* [2012] CLJU 971; [2012] 1 LNS 971.

[75] In any event, even if this argument is considered on its merits, I do not find it to be particularly convincing or substantive. A thorough perusal of the contemporaneous documents exchanged between the parties reveals that what the plaintiff is seeking in the intended derivative action are routine business and commercial documents to prove that AMSB had indeed provided management services commensurate with the exorbitant quantum of management fees charged. The plaintiff had, in the 27 separate requests made to the majority directors over a period of six years from 2 November 2016 to 19 September 2023, asked for information and documents such as the number of staff employed by AMSB, their employment contracts and scope of work, the costs expended by AMSB on salaries and professional fees as well as timesheets showing the exact work done by AMSB's staff in relation to the legal proceedings. These documents are indubitably necessary for the plaintiff to ascertain whether the astronomical increase in management fees from USD8,000 to USD40,000 or USD60,000 per month was justified.

[76] A careful examination of the specific information and documents requested by the plaintiff, as chronicled in para. 78 of the plaintiff's reply submissions, shows that none of the items are in the nature of legal advice rendered by the company's solicitors or any other materials that could possibly be protected by litigation privilege. In summary, the requests for information and documents are described as follows:

(i) on 2 November 2016, the plaintiff made the first oral request during a board of directors' meeting, asking for justification of the increase in management fees from USD8,000 to USD40,000 a month;

(ii) on 14 November 2017, the plaintiff made the second oral request during another board of directors' meeting, asking for a breakdown of the USD40,000 monthly management fees budgeted for the following year;

(iii) on 10 April 2018, the plaintiff made the third oral request during a board of directors' meeting, requesting proof of expenditure for the USD40,000 a month and an explanation for the proposed increase from USD40,000 to USD60,000 a month;

(iv) on 5 June 2018, the plaintiff made the first written request *via* letter, seeking details of the additional staff and specialists engaged by AMSB to deal with litigation matters;

(v) on 8 August 2018, the plaintiff made the second written request *via* email, requesting explanations for the management fees paid in April, May, and June 2018;

(vi) on 16 August 2018, the plaintiff made the third and fourth written requests *via* email, reiterating the previous requests and questioning how the company paid USD40,000 instead of the board-approved USD60,000;

(vii) on 27 August 2018, the plaintiff made the fifth written request *via* email to follow up on his previous emails;

(viii) on 12 September 2018, the plaintiff made the sixth written request *via* email, following up again on unanswered questions regarding management fees;

(ix) on 5 October 2018, the plaintiff made the seventh written request, continuing to request clarification on the management fees for October 2018;

(x) on 15 July 2020, the plaintiff made the eighth written request *via* email, questioning the basis of management fees charged during the MCO period when the company's offices were possibly closed;

(xi) on 8 December 2020, the plaintiff made the ninth written request, asking for supporting documents and justification for AMSB's management fees and their comparison with actual legal fees paid to the company's solicitors;

(xii) on 13 December 2020, the plaintiff made the tenth written request, demanding the same information and supporting documents requested previously;

(xiii) on 11 January 2021, the plaintiff made the 11th written request, repeating his demand for a response to his prior emails from December 2020;

(xiv) on 22 February 2021, the plaintiff made the fourth oral request during a board of directors' meeting, proposing to reduce the management fees to USD8,000 a month and reiterating his questions from earlier emails;

(xv) on 23 February 2022, the plaintiff made the 12th written request, calling for the immediate reduction of the management fees to USD8,000 per month;

(xvi) on 18 March 2022, the plaintiff made the fifth oral request during a board of directors' meeting, once again motioning to reduce the management fees to USD8,000 per month;

(xvii) on 29 March 2022, the plaintiff made the 13th written request, asking AMSB for detailed documents to show how the monthly management fees are justified;

(xviii) on 20 April 2022, the plaintiff made the 14th written request *via* email, following up on his previous requests and questioning why AMSB's management fees exceeded the company's legal fees;

(xix) on 23 September 2022, the plaintiff made the sixth oral request during a board of directors' meeting, again proposing to reduce the management fees to USD8,000, citing unnecessary staff for legal cases;

(xx) on 17 October 2022, the plaintiff made the 15th written request, asking for explanations for the basis of AMSB charging USD40,000 monthly and questioning if board papers are required to deliberate the matter;

(xxi) on 16 November 2022, the plaintiff made the 16th written request, repeating his previous questions about management fees and board procedures;

(xxii) on 6 December 2022, the plaintiff made the 17th written request, again asking for a breakdown of AMSB's management fees over the last five years;

(xxiii) on 26 February 2023, the plaintiff made the 18th written request, following up on earlier emails and raising issues discussed at previous board meetings, including his proposal to reduce management fees;

(xxiv) on 25 August 2023, the plaintiff, through his solicitors, issued a letter of demand to the board of directors, formally requesting justification for the management fees and supporting documents;

(xxv) on 6 September 2023, the plaintiff made a letter *via* solicitors to follow up on the letter of demand dated 25 August 2023, as there had been no response from the board; and

(xxvi) on 19 September 2023, the plaintiff issued a statutory notice *via* solicitors to the board, giving notice of his intention to apply for leave to initiate derivative proceedings under s. 347 of the Companies Act 2016.

[77] The documents sought are all in the nature of commercial records relating to AMSB's expenditure and services provided in exchange for the management fees paid. There is absolutely no request for any privileged communications between the company and its lawyers. The mere fact that some of the documents may pertain to litigation involving the company does not cloak them with privilege, as they do not entail the disclosure of any legal advice or litigation strategy.

[78] The suggestion that allowing the plaintiff access to standard documents like employment contracts, salary details, and timesheets of AMSB's staff could somehow impair the company's defence in the lawsuits brought by the plaintiff does not seem like a well-supported or tenable position. The plaintiff is not asking for the company's privileged documents but merely seeking evidence that the services rendered by AMSB were proportionate to the management fees paid. It strains credulity to argue that the disclosure of such documents would stifle or prejudice the company's position in the legal proceedings commenced by the plaintiff.

[79] That the majority directors are raising the spectre of privilege as an afterthought is evident from the fact that in the various replies by the majority directors to the plaintiff's requests for supporting documents, not once was the issue of privilege asserted.

[80] They show that the majority directors had ample opportunities to claim privilege if it was indeed applicable but conspicuously never did so. The ineluctable conclusion to be drawn from this omission is that the majority directors themselves did not genuinely believe that the documents sought by the plaintiff were privileged in nature.

[81] With respect, I find the majority directors' reliance on the case of *Ng Pak Mui v. Tay Mary & Ors* [2022] CLJU 780; [2022] 1 LNS 780; [2022] 11 MLJ 115 to be somewhat misplaced in this instance. In that case, the documents sought by the plaintiff in the intended derivative action included information passed between the company and its solicitors in respect of suits wherein the plaintiff was the opposing party. It was in those circumstances that Ong Chee Kwan JC (as he then was) found that part of the information sought may be protected by legal professional privilege. The factual matrix of *Ng Pak Mui* is thus, fundamentally different from that in the present action, as the plaintiff here is not seeking any of the company's correspondence with its lawyers but only the disclosure of objective evidence to show that the quantum of management fees paid to AMSB was justified.

[82] On a holistic consideration of the evidence and the applicable legal principles, I find that the majority directors' argument on abuse of process to be convincing and ought to be rejected. The majority directors have not shown any credible evidence that the plaintiff is attempting to procure privileged information to stifle its defence in the legal proceedings. The documents sought by the plaintiff are all in the nature of commercial records, not legal advice. The mere fact that some of these documents may relate to the litigation between the parties does not mean that they automatically attract legal professional privilege. If that were the case, a company can conveniently assert privilege over any document even tangentially connected to a legal dispute as a means of avoiding accountability.

[83] The majority directors' position that the plaintiff's intended derivative action is an abuse of process, serving as a means to access privileged information, does not seem well supported. This contention appears to have emerged relatively late, and may reflect an attempt to hinder the plaintiff's claim. Nonetheless, I do not find this argument persuasive based on the available evidence. It is in fact the majority directors' obdurate refusal to provide any supporting documents to show that AMSB had rendered services commensurate with the management fees paid that smacks of bad faith and improper purpose. The inference that emerges from the majority directors' conduct is that it has no credible evidence to justify the exponential increase in management fees and is hence seeking to hide behind the cloak of privilege to avoid scrutiny.

[84] In the circumstances, I do not find the majority directors' contention that the plaintiff's intended derivative action amounts to an abuse of process aimed at obtaining privileged information to be well supported. This appears to be a diversion from the core matters under dispute before the court. The argument on legal professional privilege, which was never once raised contemporaneously but advanced for the first time in these proceedings, is an afterthought that is factually and legally unsustainable. The plaintiff has amply demonstrated that the documents sought in the intended derivative action are all in the nature of routine commercial records that do not attract privilege. I do not find the majority directors' assertion of privilege as grounds to avoid providing justification for the substantial increase in management fees to be a convincing position. Transparency on this issue seems warranted. Accordingly, this argument is dismissed.

Abuse Of Process: To Multiplicity Of Proceedings

[85] The majority directors submit that the plaintiff's intended derivative action is an abuse of process as it would give rise to multiplicity of proceedings, since the issue of the legitimacy of the management fees paid by the company to AMSB is already a live issue before the Court of Appeal in the company's pending appeal against the dismissal of Suit 163. The majority directors argue that in Suit 163, the company had claimed the

management fees from the plaintiff and others, as part of the general damages allegedly suffered by the company as a result of a purported conspiracy to injure the company. As such, the intended derivative action would result in two different courts trying the same issue and potentially arriving at inconsistent decisions on the legitimacy of the management fees, thereby creating a multiplicity of proceedings. The majority directors rely on the cases of *Lai Kim Loi v. Datuk Lai Fook Kim & Co* [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61; [1989] 2 MLJ 290 and *Ho Num Chon & Anor v. Tech-Lab Manufacturing Sdn Bhd* [2017] 5 CLJ 187; [2017] 9 MLJ 32 in support of their contention.

[86] The plaintiff vehemently denies that the intended derivative action would give rise to any multiplicity of proceedings. It is submitted that despite sharing the common thread of the legitimacy of the management fees paid to AMSB, the substance, character, and effect of Suit 163 and the intended derivative action are fundamentally different. The plaintiff highlights that in Suit 163, the company had sued the plaintiff, NSSB and Dato' Wan for conspiracy to injure and breach of duties, whereas in the intended derivative action the plaintiff is suing the majority directors and AMSB for breaches of duties and unjust enrichment on behalf of the company. Further, while one of the heads of general damages claimed by the company in Suit 163 was the increase in management fees paid as a result of the alleged conspiracy, in the intended derivative action the unsubstantiated increase in management fees itself forms the very basis of the action and is claimed as special damages. There are also material differences in the reliefs sought in the two actions.

[87] The plaintiff places reliance on the Court of Appeal's decision in *Tai May Chean v. New Way Capital Sdn Bhd & Anor And Another Appeal* (*supra*) where it was held that the fact that multiple proceedings may arise from the same factual matrix does not *ipso facto* give rise to multiplicity if the substance, character and effect of the actions are different. Support is also drawn from the High Court's decision in *Golden Plus Holdings Bhd & Ors v. China Idea Development Limited & Ors* [2021] CLJU 2083; [2021] 1 LNS 2083 which applied *Tai May Chean* and held that there is no duplicity of proceedings if the causes of action and reliefs sought in the two actions are distinct, even though they may share some overlap in the underlying facts. It is submitted that the majority directors' reliance on *Lai Kim Loi* and *Ho Num Chon* is misplaced as the plaintiffs in those cases had commenced multiple actions based on the same facts and seeking substantially similar reliefs, unlike the present case.

[88] I have given careful consideration to the forceful arguments advanced by the parties. In my judgment, the plaintiff's contentions on this issue are well-founded and ought to be upheld. A close examination of the pleadings in Suit 163 and the intended derivative action shows that while both suits concern the legitimacy of the management fees as a common factual substratum, they are materially different in substance, character, and effect.

[89] In Suit 163, the company had sued the plaintiff, NSSB and Dato' Wan for alleged conspiracy to injure the company and breach of duties as directors. The defendant company's pleaded case was that the defendants in that suit had by their various acts conspired to disrupt and destabilise the company's operations. The purported increase in management fees paid to AMSB was pleaded as part of the special damages flowing from the alleged conspiracy. The learned judge had dismissed the company's claim for conspiracy in its entirety, including the general damages. The finding on the lack of causation between the alleged conspiracy and the heads of general damages claimed was not appealed. The live issue in the company's pending appeal therefore does not concern the legitimacy of the management fees *per se* but whether the alleged conspiracy and breach of duties by the defendants had been made out.

[90] In diametric contrast, the intended derivative action concerns a direct challenge by the plaintiff on behalf of the company against the majority directors and AMSB on the propriety of the management fees. The thrust of the plaintiff's case is that the majority directors had breached their fiduciary duties to the company by approving a colossal increase in the management fees from USD8,000 to USD40,000 and subsequently to USD60,000 per month without any proper justification or supporting evidence that AMSB had provided services commensurate with the fees paid. The plaintiff contends that in acting as such, the majority directors had failed to act *bona fide* in the best interest of the company and had placed the interests of AMSB, their nominator, above those of the company. It is also alleged that AMSB had been unjustly enriched by receiving management fees exceeding USD2 million without a valid basis.

[91] The disparity in the substance and character of the two actions is evident from the reliefs sought therein. In Suit 163, the company had claimed for a declaration that the defendants had conspired to injure the company and general damages arising therefrom, which included the increase in management fees paid from October 2017 to January 2019 as a result of the alleged conspiracy. In contrast, in the intended derivative action, the plaintiff is seeking declaratory relief that the majority directors had acted in breach of their fiduciary duties and an order that they are jointly and severally liable to the company to repay the substantial increase in management fees paid from April 2017 to date, which were allegedly unsubstantiated by any documentary proof. The plaintiff is also seeking a permanent injunction to reduce the management fees to their original quantum of USD8,000 or any other sum that can be justified by evidence.

[92] Viewed in its proper perspective, it is abundantly apparent that notwithstanding the common thread of the legitimacy of the management fees, the substratum of Suit 163 and the intended derivative action are worlds apart. The former is premised on establishing a conspiracy to injure the

company and a breach of directors' duties arising from certain pleaded acts, of which the increase in management fees is but one of the alleged consequences. The latter, on the other hand, is a direct challenge by the plaintiff on behalf of the company against the majority directors for breaching their fiduciary duties in approving the exponential increase in management fees without any commercial justification. The intended derivative action also seeks to recover the unsubstantiated increase in management fees in its entirety from April 2017 to date as opposed to only a limited period from October 2017 to January 2019 as claimed in Suit 163. The dichotomy in the substance, character and effect of the two proceedings is therefore plain and obvious.

[93] I am fortified in this conclusion by two appellate authorities that are on all fours with the present factual matrix. The first is the Court of Appeal's decision in *Tai May Chean v. New Way Capital Sdn Bhd & Anor And Another Appeal* (*supra*), where it was unequivocally held that the fact that two actions arise from the same factual background does not necessarily mean that there is a multiplicity of proceedings. In deciding whether a duplicity of proceedings arises, the focus ought to be on the substance, character and effect of the actions, not the underlying facts. Where the causes of action pleaded and reliefs sought in the two actions are distinct, there can be no multiplicity even though they may share a common narrative. The appellate court expressly cautioned against taking an inflexible approach to the doctrine of multiplicity by placing form over substance.

[94] This principle was subsequently applied by the High Court in *Golden Plus Holdings Bhd & Ors v. China Idea Development Limited & Ors* (*supra*) to find that there was no abuse of process where multiple actions arose from the same share allotment agreement. Despite the actions sharing the same factual foundation, there was no duplicity as the pleaded causes of action and reliefs prayed for were separate and distinct. The fact that there may be some overlap in the facts relied upon was not a sufficient basis to stay or strike out the later action on the ground of multiplicity.

[95] Drawing an analogy to the present case, I find that the intended derivative action is not duplicitous of Suit 163 as they are grounded on different causes of action and seek disparate reliefs. The fact that both actions share the common narrative of the legitimacy of the management fees does not, without more, constitute an abuse of process. The fundamental differences in the substance and character of the two actions necessarily mean that they can and ought to be allowed to proceed separately, as the findings in one will not determine the outcome of the other. The concerns of inconsistent judicial decisions and vexation to the company do not therefore arise on the facts of this case.

[96] The upshot of the foregoing analysis is that the majority directors' contention that the intended derivative action would give rise to a multiplicity of proceedings is plainly unsustainable and must be rejected. The

majority directors' reliance on the cases of *Lai Kim Loi v. Dato' Lai Fook Kim* (*supra*) and *Ho Num Chon & Anor v. Tech-Lab Manufacturing Sdn Bhd* (*supra*) is, with respect, misplaced, as those cases concerned plaintiffs filing multiple actions premised on the same facts and seeking like reliefs against the same defendants. In contrast, the intended derivative action in the present case is against a different set of defendants and is premised on distinct causes of action and prayers when compared to Suit 163. There is therefore no question of any duplicity or multiplicity of proceedings.

[97] On a consideration of the evidence in its totality, I find that the majority directors have failed to demonstrate any abuse of process or risk of multiplicity arising from the intended derivative action. The majority directors' arguments on this issue are without merit and are accordingly dismissed.

Causing The Company To Take A Position Contradictory To That Taken By It In Suit 163

[98] The majority directors submit that the plaintiff's intended derivative action would cause the company to adopt a position on the legitimacy of the management fees that is contradictory to the stand it had taken in Suit 163. This, it is contended, would severely prejudice the company's appeal against the dismissal of Suit 163 as it would effectively be an admission by the company that it had previously advanced a case on the management fees that was palpably unsustainable. In support of this argument, the majority directors rely on the High Court's decision in *Ng Pak Mui v. Tay Mary* (*supra*) where a similar contention was accepted in refusing leave to commence a derivative action.

[99] The plaintiff does not agree. Whilst accepting that the company had in Suit 163 taken the position that the increase in management fees paid to AMSB was legitimate, the plaintiff argues that this cannot be a bar to the company now taking a correct stand in the intended derivative action that the increase is in fact wholly unsubstantiated. The plaintiff contends that there can only be one truth – either the increase in management fees is justified or it is not. The fact that the majority directors have till date failed to produce a single shred of evidence to support the exponential increase in Suit 163 despite repeated requests leads to the irresistible conclusion that the payments to AMSB are indefensible. In such circumstances, the question of the company taking an inconsistent position does not arise as the stand in Suit 163 is demonstrably erroneous and ought to be abandoned. To hold otherwise would be to compel the company to persist in prosecuting an appeal in Suit 163 that is doomed to fail, which cannot be countenanced. It is also highlighted that in any event, the company's claim for management fees as general damages in Suit 163 had already been dismissed by the High Court and does not form the subject matter of the pending appeal.

[100] On a careful consideration of the evidence, I find that the majority directors' argument on the company taking a contradictory position in the intended derivative action is a mere red herring that is both factually and legally unsustainable.

[101] Firstly, it is evident from the chronology of events that the plaintiff had given the majority directors every opportunity to vindicate the substantial increase in management fees paid to AMSB before commencing the present action. The plaintiff had, over a span of six years from 2017 to 2023, issued no less than 27 separate requests to the majority directors to furnish supporting documents to justify the increase from USD8,000 to USD40,000 and subsequently to USD60,000 per month. These requests, the full particulars of which are set out in para. 78 of the plaintiff's reply submissions, were met with deafening silence. Despite promising to provide evidence that the increase in management fees was commensurate with the services rendered by AMSB, the majority directors failed to produce any credible or tangible proof. All that was proffered were bare assertions unaccompanied by any documentary evidence.

[102] In the face of this persistent failure to substantiate the substantial increase in management fees, the inference is irresistible that the payments to AMSB are wholly unjustified. Elementary logic dictates that if the majority directors had in their possession documents to show that the increase in management fees was above board, they would have disclosed the same to put an end to the plaintiff's complaints. Their failure to provide the requested evidence despite being given ample time and opportunity strongly suggests that such evidence may not exist. I therefore find that the plaintiff has made out a strong *prima facie* case that the management fees paid to AMSB, over and above the original sum of USD8,000 per month, are indefensible.

[103] Given these circumstances, it would not be appropriate to uphold the company's earlier stance in Suit 163 that the increase in management fees paid to AMSB was justified. It is trite that there can only be one truth. If the increase is shown to be unsustainable, as the evidence presently demonstrates, the company cannot be precluded from abandoning its earlier erroneous stance and taking the correct position in the intended derivative action that the management fees paid are *ultra vires*. To hold otherwise would be to compel the company to continue defending a baseless claim in the appeal in Suit 163, which would be inimical to its interest and an abuse of process.

[104] Secondly, it must be noted that in any event, the company's claim for the additional management fees paid to AMSB as part of the general damages in Suit 163 had already been expressly disallowed by the learned High Court Judge. The general damages claim was dismissed on the basis that the company had failed to prove that the alleged losses were caused by the

conspiracy and breaches of duty complained of. This finding was not appealed against by the company. The issue of the legitimacy of the management fees therefore no longer arises for consideration in the company's appeal in Suit 163. It is questionable whether the intended derivative action would actually undermine the company's position in the pending appeal.

[105] Thirdly, I find that the majority directors' reliance on *Ng Pak Mui v. Tay Mary* is misplaced as that case is clearly distinguishable. In *Ng Pak Mui*, the plaintiff sought to assert in the intended derivative action that the company was insolvent when dividends were declared, which was a complete *volte-face* from the company's stand in other suits that it was solvent. It was in those circumstances that Ong Chee Kwan JC (as he then was) found that allowing the intended derivative action to proceed would result in the company taking a wholly inconsistent position. Crucially, there was no evidence in *Ng Pak Mui* that the company's original stance in the other suits was erroneous. That is in stark contrast to the present case where there is overwhelming evidence that the company's position in Suit 163 that the increase in management fees was justified is palpably incorrect and ought to be abandoned. The other material difference is that in *Ng Pak Mui*, the issue of the company's solvency was a live issue in the other pending actions, whereas in the instant case the claim for additional management fees in Suit 163 has been dismissed by the High Court and is not the subject of the pending appeal.

[106] Fourthly, it bears reiterating that the majority directors who are responsible for committing the company to the unsustainable position on the management fees in Suit 163 should not be allowed to now assert prejudice to the company as a means to stultify the intended derivative action. It is unconscionable for the wrongdoers to rely on their own improper conduct to effectively deprive the company of the opportunity to recover monies that have been wrongfully paid out by taking a correct position in the intended derivative action. This would be tantamount to allowing the majority directors to profit from their own wrong and would bring the administration of justice into disrepute.

[107] Viewed in totality, I find that there is no reasonable basis for concluding that the company would be prejudiced in defending the appeal in Suit 163 by taking the correct position in the intended derivative action that the increase in management fees paid to AMSB is indefensible. The claim for additional management fees has already been dismissed by the High Court in Suit 163 and does not arise in the pending appeal. In any event, there is clear evidence that the payments are wholly unjustified and the company cannot be prevented from abandoning its previous erroneous stance and adopting the right position. The majority directors who are responsible for committing the company to an untenable position in Suit 163 cannot be heard to complain of prejudice.

[108] In the final analysis, taking a holistic view of the facts, I find that the majority directors have failed to demonstrate any prejudice to the company in the appeal in Suit 163 arising from the intended derivative action. The argument that leave should be refused because the company would be compelled to take an inconsistent position is factually and legally unsustainable and must be rejected.

Prayer 2(c) Of Enclosure 1

[109] The court finds that prayer 2(c) of encl. 1 ought to be allowed pursuant to the wide powers conferred by s. 350 of the Companies Act 2016.

[110] Section 350 provides that in granting leave to commence a derivative action under ss. 347 and 348 of the Companies Act 2016, the court may make such orders as it thinks appropriate, including giving directions for the conduct of the proceedings and any order as to costs. The language used in the provision is couched in the broadest possible terms and makes it abundantly clear that the court is empowered to grant all necessary ancillary relief to ensure that the interests of the company are protected in a derivative action.

[111] Prayer 2(c) seeks an order that the management fees payable by the company to AMSB be reduced to USD8,000 per month pending the final resolution of the derivative action to be initiated against the majority directors and AMSB. Such an order falls squarely within the purview of s. 350(b) as an interim direction for the conduct of the proceedings. It is necessary to preserve the *status quo* and prevent the company from suffering further losses by continuing to pay exorbitant and unsubstantiated management fees to AMSB until the derivative action is disposed of.

[112] The evidence adduced by the plaintiff shows that despite repeated requests, the majority directors have persistently failed to produce any credible documentary proof that the drastic increase in management fees from USD8,000 to USD40,000 and later to USD60,000 per month is commensurate with the services rendered by AMSB. On the contrary, the contemporaneous records demonstrate that the plaintiff had on 27 separate occasions over a span of six years sought a breakdown of the work done by AMSB to justify the astronomical increase in fees. These requests for information, which include a demand for AMSB's employee details, their employment contracts and scope of work, as well as timesheets, were met with deafening silence or unilluminating responses bereft of documentary evidence.

[113] In the face of this obdurate refusal to substantiate the substantial increase in management fees, the irresistible inference is that the payments to AMSB are wholly unjustified and amount to a wrongful dissipation of the company's assets. The plaintiff has established a strong *prima facie* case that the majority directors had breached their fiduciary duties to the company by

causing these payments to be made without any commercial justification. In such circumstances, it would be wholly inequitable to allow the company to continue paying the impugned management fees to AMSB until the derivative action is finally determined. To do so, would be to put the plaintiff on an uneven keel and render nugatory any judgment that may eventually be entered in the company's favour.

[114] I am fortified in this conclusion by case law which makes it clear that the court has wide discretionary powers under s. 350 to grant any appropriate ancillary relief in an application for leave to commence derivative proceedings. In *Por Lin Chiang v. Tanjung Aircond Engineering Sdn Bhd & Anor* [2019] 1 CLJU 700; [2019] 1 LNS 700, the High Court held that upon granting leave under s. 348, it was empowered by s. 350 to grant such ancillary reliefs as prayed for by the plaintiff as it was fair, expeditious and appropriate.

[115] Applying the principles to the present case, I find that a direction for the management fees payable to AMSB to be reduced to USD8,000 per month pending the disposal of the derivative action is an appropriate interim measure that is necessary to safeguard the company's financial interests. Given the plaintiff's unrelenting but futile efforts to procure documentary proof that the quantum of fees paid is justified, there is a real risk of the company's assets being improperly depleted in the event the derivative action succeeds. An order in terms of prayer 2(c) would prevent this risk from materialising and ensure that the company is protected from further loss until the dispute is finally adjudicated upon. It would also ensure that the directors do not benefit from their own breaches pending a resolution of the matter.

[116] The majority directors' argument that the plaintiff is estopped from seeking such an order as he had previously agreed to the increase in management fees ignores the vital qualification that the plaintiff's consent was expressly subject to the condition that the increase would be reviewed annually to determine if it was justified. The board resolution increasing the fees also stipulated that the budget for the fees in the subsequent financial years would be reviewed afresh. In the circumstances, the plaintiff is clearly entitled to demand that the majority directors prove that the fees paid in the years after 2017 were warranted by the services provided. The failure to adduce any such proof means that the company should not be required to continue paying the inflated fees in the interim.

[117] For the foregoing reasons, I am satisfied that it is fair, appropriate and in the best interest of the company to allow prayer 2(c) of encl. 1. Such an order falls within the wide powers conferred on the court by s. 350 and is consonant with the objectives of the statutory derivative action. Accordingly, an order is granted that pending the final disposal of the intended derivative proceedings, the management fees payable by the company to AMSB shall be reduced to USD8,000 per month.

Conclusion

[118] In the premise, having carefully considered the evidence and submissions of both parties, I am satisfied that the plaintiff has met the threshold requirements under s. 348(4) of the Companies Act 2016 for leave to commence a derivative action. The plaintiff has demonstrated that he is acting in good faith and that it appears *prima facie* to be in the best interest of the company for the intended derivative proceedings to be pursued. The majority directors' objections on the grounds of estoppel, delay, abuse of process, multiplicity of proceedings, and contradictory positions have been found to be without merit. The plaintiff has established a strong *prima facie* case of breaches of directors' duties and unjust enrichment that warrants further investigation through a full trial. Accordingly, I allow encl. 1 and make the following orders:

(i) the plaintiff is given leave to commence derivative proceedings in the name of the defendant against Dato' Sri Suresh Emmanuel Abishegam, Dato' Ahmad Johari bin Abdul Razak, Ajaib Hari Dass, Dato' Abd Latiff bin Ahmad, Jaya Sudhir a/l Jayaram, Mak Lin Kum, Ahmad Lutfi bin Abd Latiff, Dato' Sri Abd Rahim bin Jaafar and Azimuth Marine Sdn Bhd;

(ii) the plaintiff is authorised to control the conduct of the derivative proceedings;

(iii) the management fee payable by the defendant to Azimuth Marine Sdn Bhd is reduced to USD8,000 per month pending final resolution of the derivative proceedings;

(iv) the defendant shall pay all reasonable legal fees and disbursements incurred by the plaintiff in connection with this application or pending the grant of leave or any other interim relief on a full indemnity basis;

(v) the defendant shall pay the costs incurred by the plaintiff for the derivative proceedings to be initiated on behalf of the defendant against the named parties on a full indemnity basis;

(vi) costs of and incidental to this application shall be borne by the defendant; and

(vii) costs of RM30,000 shall be paid by the defendant to the plaintiff subject to allocatur fee.